

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

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In the Matter of

Amendment of Section 73.202(b),
 Table of Allotments
 FM Broadcast Stations
 (Tullahoma, Tennessee and Madison,
 Alabama)

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MM Docket No. 00-64
 RM-9117

JUL 14 2000

~~FEDERAL COMMUNICATIONS COMMISSION~~
 OFFICE OF THE SECRETARY

To: Chief, Allocations Branch

**MOTION TO DISMISS RULE MAKING PETITION AND
STRIKE REPLY COMMENTS**

STG Media, LLC ("STG"), by its attorneys, hereby requests that the Commission dismiss the rule making petition filed by Tennessee Valley Radio, Inc. ("TVR") as patently defective for failing to comply with Sections 73.315(a) & (b) of the Commission's Rules at the time the Commission adopted the Notice of Proposed Rule Making ("NPRM") in this proceeding. In the alternative, the Commission should dismiss TVR's Reply Comments as an untimely counterproposal in this proceeding. In support thereof, the following is respectively submitted.

Introduction

TVR is the licensee of Station WPZM, licensed to Tullahoma, Tennessee. On May 30, 1997, TVR filed a petition for rule making requesting a change in the FM Table of Allotments, Section 73.202(b), to reallocate Channel 227C1 from Tullahoma to Madison, Alabama and modify the authorization for Station WPZM to specify Madison as its new community of license. TVR also submitted an engineering study in support of its claim that the station would provide the required city-grade signal over Madison from its present transmitter site. The

FCC agreed that the proposal warranted consideration and on April 2, 2000, released the Notice of Proposed Rule Making (“*NPRM*”)¹ in this proceeding. Neither the *NPRM* nor TVR’s petition proposed to change the station’s transmitter site or to downgrade the facilities.

STG filed Comments in this proceeding showing that TVR’s rule making proposal did not comply with Section 73.315(b) of the Commission’s Rules because TVR did not take into consideration the mountainous terrain that will prevent WPZM’s transmitter site from providing the required line of site coverage to the city of Madison. In its Reply Comments, STG provided a further technical statement demonstrating that TVR’s petition did not comply with Section 73.315(b). The technical statement also challenged whether the petition complied with Section 73.315(a).

In its Reply Comments, TVR admitted that a break in line-of-site coverage between the transmitter site and Madison exists.² TVR also conceded for the first time in its Reply Comments that its petition does not comply with Section 73.315(a) of the Commission’s Rules and will not provide the required city-grade signal over Madison.³

Confronted with the deficiencies in its rule making proposal, TVR did not withdraw its defective petition or submit a technical statement rebutting the deficiencies. Instead, TVR acknowledged that the rule making was defective and filed an untimely counterproposal in its Reply Comments, proposing for the first time to downgrade WPZM from Channel 227C1 to Channel 227C2 and to change the station’s transmitter site.

¹ *Tullahoma, Tennessee and Madison, Alabama*, DA 00-782 (Chief, Alloc. Br.) (released April 7, 2000).

² *See TVR Reply Comments and Engineering Exhibit* at 2 (the “*TVR Engineering Exhibit*”).

³ *See Id.*

Discussion

STG hereby requests leave from the Commission to file this Motion. Section 1.415(d) of the Commission's Rules does not contemplate the filing of additional pleadings in this proceeding after the deadline for filing Reply Comments unless specifically requested or authorized by the Commission. The deadline for filing Reply Comments in this proceeding expired on June 14, 2000. However, the new facts contained in TVR's Reply Comments constitute good cause for accepting this Motion. TVR admits for the first time in its Reply Comments that technical deficiencies existed with regard to its rule making petition prior to the Commission adopting the *NPRM*. The Reply Comments also include TVR's new counterproposal. These new facts are of decisional significance in this proceeding. Thus, good cause exists for accepting this pleading.

The Commission should dismiss TVR's rule making petition as defective because the petition did not comply with Sections 73.315(a) & (b) of the Commission's Rules at the time the Commission adopted the *NPRM* in this proceeding and still is not in compliance. TVR admits in its Reply Comments that TVR's "proposal at Madison does not comply with the threshold requirement that at the allotment stage the entire city of license must fall within the predicted contour."⁴ TVR basis its determination on a study of the most current map of Madison, dated January 2000. TVR specifically acknowledges that its rule making proposal was defective since at least January of this year and continued to be defective when the Commission adopted the *NPRM*.

Although TVR challenges STG's showing of TVR's failure to comply with Section 73.315(b) as incomplete, alleging that STG analyzes only one radial from the WPZM

transmitter site to the community of Madison, TVR itself fails to provide any evidence that its rule making petition complies with Section 73.315(b). STG, on the other hand, provided further technical information of noncompliance in its Reply Comments.

The Commission will not grant a rule making petition that does not comply with the Commission's rules and policies. The Commission adopted TVR's rule making petition, relying upon information provided by TVR. Now that TVR has admitted that its rule making petition is defective, the Commission must dismiss TVR's rule making petition for failing to comply with Sections 73.315(a) & (b).

If the Commission does not dismiss TVR's petition, the Commission should strike TVR's Reply Comments as an untimely counterproposal. TVR's rule making petition did not propose to change the transmitter site for the station or downgrade its facilities. It was only after STG pointed out in its Comments the defects in TVR's petition, that TVR untimely proposed in its Reply Comments to downgrade WPZM and change transmitter sites. TVR's proposal to downgrade WPZM and change transmitter sites constitutes an untimely counterproposal.

TVR's original proposal to operate WPZM from its existing transmitter site was an important element in the public interest analysis made by the Commission and STG in this proceeding. The Commission specifically determined that a gain and loss area study would not be required because TVR did not seek to relocate its transmitter site.⁵ STG similarly presumed in its Comments that no gain and loss area study was required because TVR did not propose

⁴ See *Id.*

⁵ See *NPRM* at 2-3.

any change in transmitter site and prepared its public interest analysis accordingly.⁶ TVR did not file any gain and loss area study in its Comments or Reply Comments.⁷

The untimely counterproposal will prevent public comment on whether the counterproposal serves the public interest. It is understandable that TVR would prefer to avoid public comment on its counterproposal, since STG's initial analysis of the gain and loss area between the present and proposed facilities for WPZM indicates that the Commission must dismiss the counterproposal because it would not serve the public interest. An initial review by STG's engineer indicates that downgrading WPZM and changing the station's transmitter site would result in a 30% loss of population (176,045 persons) and a 48% loss of area served (7,982.45 sq. km). These facts, when considered with the other public interest arguments contained in STG's previous filings in this proceeding, overwhelmingly supports retention of WPZM in Tullahoma and denying TVR's petition.⁸

The untimely proposal to change transmitter sites for WPZM prevents the filing of counterproposals in this proceeding that could represent a preferential arrangement of the FM Table of Allotments. Because TVR originally did not propose to change its transmitter site, the public could not file counterproposals since any counterproposal would have to protect WPZM's present transmitter site. However, a change in transmitter site could permit the filing of counterproposals. If the Commission accepts this untimely counterproposal, TVR receives

⁶ See *STG Comments* at 3 (public interest determination does not require study of gain or loss area because TVR did not propose a change in transmitter site for WPZM).

⁷ TVR's failure to provide a gain and loss area study constitutes a separate reason for rejecting the counterproposal because TVR has failed to provide the required public interest analysis.

⁸ STG does not intend this analysis to constitute its complete analysis of the lack of public interest benefits contained in the TVR counterproposal, but merely as an example of the type of comments on the public interest benefits that TVR's untimely counterproposal will deny the FCC.

an unfair advantage by foreclosing Commission consideration of competing proposals, to the detriment of the public interest.

Similarly, the proposed downgrade of WPZM also constitutes an untimely counterproposal because of the attendant possibility of foreclosing other changes to the FM Table of Allotments without providing notice to affected parties and an opportunity for such parties to submit comments. The counterproposal is not a logical outgrowth of the rule making proceeding that the Commission normally considers in these proceedings, such as the substitution of a different channel of the same class for the one originally proposed in the *NPRM*. The proposed downgrade of WPZM, if contained as part of TVR's original rule making petition, could have permitted the public to file counterproposals that represented a preferential arrangement under the FM Table of Allotments. TVR's untimely counterproposal prevents public comment without providing future notice to the public.

Conclusion

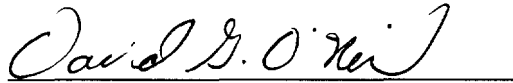
The Commission expects rule making petitions to be complete, accurate and in full compliance with the FCC's Rules. TVR admits that its petition did not comply with Section 73.315(a) since January 2000 and was not in compliance when the Commission adopted the *NPRM* in this proceeding. STG has proven that the petition never complied with Section 73.315(b). Failure to comply with either rule mandates dismissal of the rule making petition.

In the alternative, the Commission should strike TVR's Reply Comments proposing to downgrade WPZM and change transmitter sites as an untimely filed counterproposal. The counterproposal forecloses future changes to the FM Table of Allotments without providing the public adequate notice and an opportunity for comment.

WHEREFORE, for the foregoing reasons, STG Media, LLC hereby requests that the Commission dismiss TVR's rule making petition and strike TVR's Reply Comments.

Respectfully submitted,

STG MEDIA, LLC

A handwritten signature in cursive script, reading "David G. O'Neil", is written over a horizontal line.

David G. O'Neil, Esq.

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July 14, 2000

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CERTIFICATE OF SERVICE

I, Victor Onyeoziri, a secretary with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that I have caused a copy of the foregoing "MOTION TO DISMISS RULE MAKING PETITION AND STRIKE REPLY COMMENTS" to be mailed, first-class, postage prepaid this 14th day of July, 2000 to the following persons:

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* Via Hand Delivery